THE LAW OF THE ADMINISTRATION IN AMERICA.

WHETHER we regard the intrinsic interest of the subject or its practical importance from a political point of view, it must appear as remarkable that that branch of the public law which deals with the organization and action of the government in its administrative department has, until a very recent time, received so little attention from English and American jurists as not even to be distinguished by a commonly accepted name. There seems to be a general impression that what we call constitutional law covers the whole field of the action of the government in its legal aspect. Nor is this impression altogether unfounded. Our constitutions regulate an ever-increasing number of matters with ever-increasing particularity of detail, and our courts place such a liberal construction upon the constitutional rights of liberty and property, that questions of constitutional law, which in Europe are apt to be confined to the relations between the different departments of the government and to be settled by the balance of political power, in this country enter constantly into the exercise of governmental power over the individual, and are brought before and passed upon by the courts. Even in America, however, the constitutions leave to the legislature considerable liberty in determining the scope and the manner of governmental action, and the great mass of statutory legislation is safely within the limits of legislative discretion. Of the public statutes which are passed every year, only a small portion relate to private or criminal law ; the largest number regulate, in some respect, the administration of the government, creating official powers or duties. However unsystematic and chaotic this legislation may appear to the superficial observer, it must, in the nature of things, follow certain uniform principles and forms, and the relations thereby created

must raise corresponding legal problems. The body of law which is thus developed regulates and limits governmental action without involving constitutional questions. Its subject matter being the administration of public affairs, as distinguished from legislation on the one side and from the jurisdiction of the courts on the other, it has been aptly called administrative law.[1] It is to be hoped that the term will become more familiar to the public, and especially to the legal profession, than it is at present, and that the subject itself will become one of the recognized branches of public law.

As long as constitutions shall differ in their scope, the line between administrative and constitutional law will fluctuate, and in many cases we shall be at liberty to assign a question to the domain of the one or of the other, according to the point of view which we may adopt. So we should be inclined to speak of a question of constitutional law wherever the issue is directly between liberty and sovereignty — between individual right and governmental power — whether the issue arise upon a direct conflict between the two, or upon a question of giving the individual a share in the constitution and conduct of government, or upon a question of organizing government with a view to securing the integrity of liberty and property. We should speak of a question of administrative law where merely the legality of official action is involved, because the government may be in no wise committed to the support of the officer's claims of authority; also where the fiscal rights and liabilities of the government are in issue, because in this sphere it does not represent sovereign power ; so also, as a rule, the question of remedy against the government belongs to administrative law, since the constitution, even where it defines rights, rarely points out the means of enforcing and protecting them. In all countries the organization of the local divisions of the state, the distribution of functions between central and local government, the creation of offices and the determination of their several spheres and mutual

[1] Prof. F. J. Goodnow has recently published a systematic work with the title : Comparative Administrative Law (New York, Putnams, 1893). *Cf.* vol. i, p. 7.

relations, are left to legislation, either entirely or with few exceptions, and all these matters may therefore be regarded as belonging to administrative, not to constitutional law.

The distinction becomes even clearer when, leaving aside purely legal criteria, we observe the development and formation of the two branches of the public law from a historical or political point of view. So, without touching the form of government or the powers of the crown, Prussia instituted fundamental administrative reforms; so, amidst an incessant fluctuation of governments, dynasties and constitutions, France has shown the most astonishing stability in its administrative organization as established by the first Napoleon; so in England, until the recent local government acts brought a slight reaction, the administration had been centralized and largely stripped of its self-governmental character, while the political constitution was steadily developing in the direction of democracy; so the two greatest modern republics, the United States and France, represent the opposite extremes of administrative organization.

As the science of administrative law is new and has been chiefly developed in France and Germany, it is natural that the attention of the American student should be turned to foreign law. This is all the more justifiable and proper, as the administrative problems in the various countries are in many respects similar, and the experiences of one country have been utilized in the reforms of another. The administrative system of England has been more profoundly studied by a German — Professor Gneist — than by any Englishman; in fact, Gneist was the first to explain the underlying system in the chaotic mass of statute law that had accumulated for centuries. Gneist's works on English administration have had a great influence upon German legislation, and the local organization of Prussia presents now the most ingenious solution of the problem how to combine bureaucracy and self-government, — one of the most important political problems of the present day. The administrative system of France is a model of logic and simplicity; it illustrates the possibilities of artificial and

deliberate, as distinguished from historical, organization. The symmetrical and harmonious structure of the system appears to be a real element of strength from the administrative point of view, whatever may be the political effects of the system on the capacity of the people for self-government. England, on the other hand, shows in its local divisions the baneful effects of a development left to the accidents of unsystematic legislation according to the needs of the moment — a development which has resulted in a "chaos of authorities, of rates and of areas," and which has favored the natural tendency towards bureaucratic centralization.

To the American student an acquaintance with the foreign law will reveal the interesting fact that, however diverse the systems of the European states may be, they appear almost uniform when compared to our own system. While many of our institutions may find parallels in Europe, our administrative system seems to be unique. We may, for the sake of convenience, speak of an American system; its most peculiar features, however, do not appear in the national government, but in that of the states, which in this respect are all substantially the same. We find here a development which is entirely original, and in which the democratic spirit of our institutions is most perfectly realized. In no part of the government has there been such a radical change from the European models which the makers of our first constitutions had before their eyes, as in the executive department, in which the sovereign power comes into closest contact with the citizen. Especially in the organization of the central administration, the European standards of comparison fail almost entirely. The contrast between our commonwealths and the European states is all the more instructive because the functions of internal administration, which are determined far more by the progress of civilization than by political theories, have in all countries alike a tendency to grow and assimilate, and because therefore the ends which are thus pursued by the most dissimilar methods are substantially similar. This contrast may be described as follows:

In the European states in which the monarchical rule prevails or in which its traditions are still powerful, the administration is constituted in such a manner that its organs appear as a distinct portion of the state and of the people. The chief executive stands as the representative of governmental power; he is the head of an army of officials who derive their functions and duties directly or indirectly from him, whose hierarchical organization culminates in his person, who have received a special training, who serve the state for life, and whose interests are therefore to a large extent identified with those of the government, and somewhat dissociated from those of the people in their capacity as subjects. The government appears as a distinct organization in the state; though the mass of people, having in modern times received a share in the administration of public affairs, now coöperate to some extent with the professional bureaucracy in the conduct of the government. This system may be designated as bureaucratic government.

Such an organization of a separate and permanent body of officials, connected by professional traditions, by an *esprit de corps* and by different grades of subordination culminating in one central chief, is believed to be contrary to the American conception of popular government. Our theory is this: not only are the people the source of governmental power, but they exercise that power themselves. They exercise it through officers taken out of their own number, who assume public functions for a short and definite term, and then rejoin the ranks from which they have stepped temporarily, thus never losing their contact with the people. The powers of these officers differ in degree and in territorial extent, but a higher degree of official power does not necessarily mean the right of direction or control over a lower office in the same sphere. Not only are the officers of the government not separated from the people; they are not organically connected with one another; they are held together only through their common allegiance and responsibility to the people. This system may be designated as self-government, because the difference between rulers and ruled is reduced to a minimum.

In its influence upon the principles of administrative law the most important aspect of the system of self-government is the lack of organic connection and concentration of the different offices which constitute the administration. This distinguishes the executive from the other two departments of the government. The legislature is naturally a close organization ; the judiciary consists of a comparatively simple system of courts, exercising inherent and partly undefined powers, and the higher courts have appellate or supervisory control over the lower. But the administrative department has no such coherence ; and this is due partly to constitutional provisions and partly to legislation. In this respect the opposite course of development in the states and in the federal government, owing to different constitutional powers, is extremely instructive.[1] The growth of the administrative powers of the President of the United States until they amount at the present time to a substantial direction of the national administration, has been due largely to his qualified power of appointment, and still more to the absolute power of removal enjoyed by him except during a comparatively short interval. A vigorous and timely use of the power over the official *personnel* gradually and insensibly established a concentration of the control of administrative functions, and a strong executive naturally became the depository of extensive delegated statutory powers. Of course the peculiar sphere of a federal administration aided this development very materially.

In the states, on the other hand, the powers of the chief executive over the *personnel* of the administration were from the beginning more qualified, and were subsequently narrowed by constitutional changes. But the functions of the chief executive that remain after the powers of appointment and removal are taken away, are under our state constitutions political, not administrative. The clause which provides that he is to see that the laws are executed, is little more than a phrase, conferring not a single specific power and sanctioning merely the

[1] The tracing of this development forms one of the most interesting and valuable parts of Professor Goodnow's work. See vol. i, pp. 53–66.

privilege of issuing proclamations or writing letters warning officials to do their duty. It certainly does not involve a supplementary ordinance power. Unless, therefore, the legislature was willing to vest large administrative powers in the chief executive, he was bound to become what the constitutions had fitted him for by the express powers conferred upon him — the political head of the government. Now the legislature, while it has to some extent increased the executive power of appointment, has withheld from the chief executive all the functions of control, direction and review, which in Europe and also in our federal government hold the administrative organization together. Still less has the legislature vested general powers of administration in the chief executive with the understanding that he might delegate their exercise to subordinate officers. On the contrary, the laws are framed in such a manner that the duty of executing their provisions is laid upon ministerial officers directly, and upon them alone; that is to say, each officer has his specific and independent jurisdiction. It is interesting to notice the contrast with the French system. Even where the law in France directs an act to be done by the prefect, his official duty to act comes through the channel of executive instruction: the minister is under legal obligation to direct him to act, but the prefect's duty of obedience is first to the minister and only indirectly to the law.

The advantage of our system is clear: the allegiance and responsibility of every officer is to the law; we may truly speak of a government by law and not by men. But we should also see the true effects of such a system with regard to the chief executive authority. The officers of the administration are not bound to the chief executive by their tenure; for they do not necessarily hold by his appointment or subject to his power of removal. Nor do they owe him obedience or any regard whatever; for their duties are not derived from him nor liable to his control. There is no subordination on the part of the lower organs of the administration. But in that case there is no unity in the executive department. If the chief executive has no administrative functions of his own, and does not really

stand at the head of those who exercise these functions, the executive is not a coördinate branch of the government with the legislature and judiciary, all constitutional declarations to the contrary notwithstanding; if there is a conflict between the enunciation of a general principle and the special provisions which govern actual relations, it is the latter and not the former which constitute the true law. This system compels the legislature to specify in detail every power which it delegates to any authority. No discretion as to scope of action or choice of means can be allowed to subordinate officers without superior control, and the hierarchical organization necessary for such control does not exist. The legislature must also regulate the exercise of official powers in every particular, not because the minute regulation is of the essence of the law (as it is, for instance, in the protection of the ballot), but because the officer has no one to look to for instruction and guidance except the letter of the statute.

Thus we arrive at the fundamental principles of our administrative system: no executive power without express statutory authority — the principle of enumeration; minute regulation of nearly all executive functions, so that they become mere ministerial acts — the principle of specialization; and specific delegation of these functions to separate officers — the principle of diffusion of executive power. In contrast to these we find in Europe executive powers independent of statute, discretionary powers of action and control vested in superior officers, and the concentration of the administrative powers of the government through the hierarchical organization of the executive department. The federal executive in the United States, like that of the commonwealths, has only enumerated powers, but there is to some extent a power of direction vested in superior officers, and its organization is hierarchically concentrated. The federal administration, therefore, stands closer to the European types than to the system prevailing in the commonwealths.

Professor Goodnow, in the work already cited, arrives at similar conclusions with regard to the local administration in our

states;[1] but in this restricted application the peculiar principles of the American administrative law lose much of their characteristic meaning, and the contrast to the European systems largely disappears. So especially with regard to the principle of the enumeration of powers, it is true that our localities have on the whole only such powers as are expressly granted, while in Germany and France an inherent right of local autonomy is recognized. But this right does not generally extend beyond communes and municipalities[2] and with regard to them it is being constantly narrowed by the statutory regulation of nearly every subject of public importance — local constitution, taxes, building regulations, streets, schools, poor relief, *etc.;* and while the statutes leave the regulation of details to the localities to an extent unknown in this country, the autonomy thus enjoyed is no longer inherent, but delegated. On the other hand the range of enumerated powers in this country is, with regard to municipalities, often so wide as to give them almost if not quite the same degree of autonomy that is enjoyed by French and German towns and cities. The difference consists chiefly in this, that the corporate capacity in Germany and France embraces the power to use the municipal resources for the establishment of public institutions and enterprises, such as markets, gas and water works and street railroads, while in this country such powers are not given by general delegation. But this results more from the narrower legal conception of corporate capacity than from a deliberate restriction of local self-government, and as far as such restriction expresses deliberate legislative policy, it is due to the great jealousy with which our law guards the exercise of the taxing power.

A further dissent may here be expressed from Professor Goodnow's view that to this principle of enumeration is to be attributed the centralization of local matters in the hands of an irresponsible central authority, *i.e.*, the legislature. It seems to me that the cause of this unfortunate tendency in our system

[1] Vol. i, pp. 223–231.

[2] The French department, *e.g.*, has only those powers which are expressly enumerated.

must rather be sought in the principle of specialization and diffusion of powers, or, as Professor Goodnow calls it with reference to the localities, in the administrative independence of the local authorities. Under the European system many powers are granted to the localities, the exercise of which is conditioned upon the approval of some superior controlling authority; in the absence of such authorities these powers are under our system simply withheld, and if their exercise is desired, application must be made to the legislature. In Europe, general laws are supplemented by executive ordinances, which can be varied from time to time, and with reference to the needs of different localities; under our system this task, again, devolves upon the legislature. The want of powers of direction and control in higher executive authorities is thus the real cause of the administrative over-activity of our legislatures, with its attendant evils. These evils appear in their worst form in the legislative interference with local self-government, especially in cities. The remedy that suggests itself most readily is a constitutional restriction of legislative power, and some states have attempted to check special legislation in this way. But the prohibition of special local acts does not and should not forbid the legislature to classify localities and to legislate for each class. This power has been abused by creating classes which in fact cover only one locality. But even without abuse it may be justifiable and necessary to class one exceptionally large city separately; so the cities of New York, Baltimore, New Orleans and San Francisco in their respective states might be practically withdrawn from the operation of the constitutional restriction, and the evil would continue unchecked precisely where the remedy was most needed. A constitutional restriction of this kind, in order to be effective, should therefore at the same time establish a classification of municipalities for purposes of legislation. Suppose, however, that the further step should be taken, and legislative interference be barred by granting a constitutional right of local autonomy; the remedy would be worse than the evil, for this would be the creation of an *imperium in imperio*, and the unity of the will of

the state would *pro tanto* be destroyed. In either case, the question would be proper: What should be substituted for the lacking power of the legislature in the exercise of a necessary and legitimate control over local government? The real difficulty lies in the absence of supervisory organs. What is to be regretted and condemned is not the power of interference vested in the legislature, which may be necessary in emergency cases, but the habit of interference which is born of and nourished by the causes indicated.

The principle of specialization and diffusion of powers without executive direction or control imposes upon the legislature functions which are really administrative. While the forms of legislation are preserved, the restriction to specific official authority or to one locality may so narrow the scope of a statute that it becomes in reality an administrative act. The legislature thus becomes in a certain sense the central administrative authority of the state — a position for which it is altogether unfitted. Executive action is in its nature responsible, because the officer who directs is also bound to see how the direction is carried out, and because the executive authorities are subject to the control of the courts or to impeachment; legislative administration, however, is both legally irresponsible, because the legislature is not amenable to any direct control, and morally irresponsible, because it is beyond the capacity of a large body to act intelligently on matters in which it has no interest. The only safeguard lies in the fact that the chief executive has a voice in legislation: as an organ of the legislative power he exercises the functions which properly belong to his sphere, and his watchfulness is expected to check the action of the legislature.

The action of the legislature as a central administrative authority, if it keeps within the forms of statutory legislation, cannot go further than the operation of a statute; that is to say, it is limited to the granting and withdrawal of powers and the imposition of duties. The legislature has other powers, not consisting in legislation proper, by which it can affect the administration of the government: the powers of impeachment

and investigation; sometimes a control over the tenure of high executive officers; always and everywhere the power of taxation and of appropriation. Through these powers it exercises a strong political control over the executive department of the government. But a further control is needed to hold subordinate officers to the performance of their duties and to protect private rights. For either of these purposes any form of legislative action must fail entirely, and resort must therefore be had either to the higher organs of the administration itself, calling into play what is known as "administrative control," or to the courts, invoking "judicial control." As it is one of the chief objects of administrative law to enforce legal action on the part of all organs of the administration, both in the interest of the government itself and in the interest of private rights, it is important to observe how the difference between the European and the American system of administration affects these methods of control.

Administrative concentration means administrative control. Graduated subordination of offices under one executive chief centers in the latter the ultimate responsibility for all official acts, and gives him the corresponding power to hold all officers to the performance of their duties. As far as the danger of official neglect and misconduct on the part of subordinates is concerned, this is the ideal kind of control; for it operates constantly through organs constituted for that very purpose, and keeps awake in every officer the sense of immediate and certain responsibility. This is the only possible control where the discretionary action of subordinate authorities is questioned on the ground of wisdom and expediency; for what is needed in such a case is a repeated opportunity for consideration, and the exercise of judgment on the basis of greater experience and at some distance from local interests or prejudices, and these desiderata can be supplied only by the higher administrative authorities. This kind of control is liable to fail where questions of fact or law arise between the administration and private persons; the issue between public interest and private right should be decided with absolute impartiality,

and the administration may be expected to lean in favor of the public interest. In this class of cases, therefore, the impartial control of judicial tribunals is more appropriate. The administrative control must fail, again, where the executive government in its highest organs is opposed to the enforcement of the law : the issue is then political and requires the action of other governmental powers. As long, however, as the citizens have no reason to distrust the administration of the government in its entire organization, the administrative control is adequate for ordinary purposes, and certainly affords the speediest and most efficient relief ; although, as a matter of principle, the possibility should be left open to the individual to appeal to an impartial tribunal for the protection of his rights. In Prussia, where the citizen has the option of appealing on questions of right either to the higher administrative authorities or to the courts, there are said to be ten cases of administrative to one case of judicial appeal.

Now the organization of the administrative system of our states excludes for the most part, if not entirely, the methods of administrative control. The national administration stands again in this respect nearer to the European systems than to the system of the states. In the latter the cases where an appeal lies to higher administrative authorities are few and decidedly exceptional, as they must be where there is as a rule no official subordination. The power of removal from office vested to some extent in the governors of many states may of course be used to control the action of the officers who are subject to it : but removal is not apt to be resorted to except in cases of public interest ; it does not remedy the wrong done ; and where it is allowed only for cause, the requirement of specific charges makes it impossible to reach many cases of remissness or incompetence, which in ordinary relations of subordination can be easily dealt with.

In fact the absence of administrative control in the states must be regarded as a deliberate principle of legislation, and as a vital part of the general scheme of keeping the executive power as weak as possible. The idea underlying our system

is that every officer is responsible to the law, and that for the enforcement of the law the courts are sufficient. The judicial control must therefore serve both purposes: it must enforce the performance by officers of their duties to the public, and it must protect private rights. For the former purpose the action of both the criminal and the civil courts is called into play. An attempt is made to secure the responsibility of the officer by making a violation or dereliction of duty on his part a misdemeanor. This method is open to the same objections that have been suggested against the governor's power of removal: the machinery of the criminal law is too cumbrous and weighty to be used on small occasions, and the penalties may be out of proportion to the offense. It would be absurd to punish every case of official misconduct with imprisonment. Besides, it is fallacious to believe that the criminal liability creates a complete judicial control; for in this country official monopoly of criminal prosecution is the rule, and therefore no case can be brought before the criminal courts, if the district attorney, or perhaps the attorney-general, that is to say, a member of the administration itself, is unwilling to act or to push the prosecution in good faith.[1] To make this criminal control complete there ought to be some possibility of criminal prosecution independent of the organs of the administration. Far more important is the indirect control of criminal and police courts where the administration itself is compelled by law to invoke their process in order to enforce its penalties. This control, however, operates exclusively for the protection of private rights.

The civil courts may be resorted to against administrative action both by way of redress in damages for wrongs done, and by way of specific relief to prevent or correct illegal action. This latter kind of relief constitutes in this country the most important method of control over the administration. It may be used by the administration itself to secure the observance of the law on the part of its officers. At the same time, however, any citizen interested — in the case of a purely public

[1] See Professor Goodnow's remarks on this point, vol. ii, pp. 184, 185.

interest probably every citizen — may institute the necessary proceedings, so that the administration does not enjoy the same monopoly of controlling the enforcement of the law as in criminal prosecutions. This relief is also granted for the protection of private rights, and is in some respects more valuable than the redress in damages, which is not allowed against the government itself and which is apt to be of little avail against financially irresponsible subordinate officers. The forms in which this relief is given deserve especial consideration. The usual remedies, *mandamus*, *certiorari*, *quo warranto* and *habeas corpus*, constitute a species of extraordinary jurisdiction which historically became vested in the courts, not as the regular organs of the administration of justice, but as the organs of the king in supervising his officers. Moreover they are altogether anomalous in their legal aspect, consisting in prerogative writs, issued as a rule in the discretion of the court, in the name of the people, and each available only for certain specific classes of illegal action. The fact that the people are a formal party to proceedings which may be controlled by private individuals, raises questions so far undiscussed, but which may spring into great importance at any moment. How far is the judgment conclusive? Does it bind the formal party, the people, *i.e.*, everybody, or only the actual party, the relator? If it binds the people, what protection is there against collusive suits instituted to protect rather than to defeat the illegal action of the officer? If it binds only the relator, is the discretion of the court an adequate protection against a vexatious multiplicity of suits? It is clear that in this matter some reform would be very appropriate; some provision should be made requiring notice to the representative of the public, the district attorney or attorney-general, in all cases where the public interest is involved, while in cases of purely private interest the forms of a private action should be substituted. This seems to be the logical course of development; by such a reform we should lose a most interesting historical survival of ancient forms of remedy, but from every other point of view the change would be a distinct gain.

Even as it is, however, the extraordinary jurisdiction by means of prerogative writs constitutes a judicial control, which, in one respect at least, compares favorably with that of the administrative courts of France and Germany. Whatever the defects and peculiarities of the remedy, it is administered by regular judicial tribunals, while in France and Germany claims arising out of the administration are adjudicated by special courts, which are connected with the administration and, with the exception of the courts of last resort, are not entirely independent. The organization of such courts is due in France to the principle of the separation of powers ; in Germany they are justified on the ground that civil judges are not well qualified to deal with questions of public law, and that purely judicial reasoning is not sufficient to determine a conflict of public and private rights. In answer to these arguments it may be said that it is perfectly proper to demand that the administration should keep strictly within the bounds set to it by law, and therefore the most vigorous scrutiny of its action, from a purely legal point of view, should be invited rather than excluded ; and as far as qualification is concerned, all that can be required is a legal training and a judicial habit of mind, and the regular courts, at least in this country and in England, have been found perfectly capable of dealing with questions of public law. The German and French system, however, has the advantage that in the place of remedies of extraordinary technicality it provides simple forms of action and, as far as possible, an informal procedure ; it also directs disputes to be decided according to equity rather than strict law, — a principle which is apt to operate in favor of the individual rather than of the administration. Above all, however, it should be remembered that the citizen has the right to seek redress by appeal to a higher administrative authority, so that he can in many cases save his rights without the expense, delay and risk of litigation. On this showing the means of control for the protection of private rights really appear ampler and more efficient under the European than under the American system.

The greatest drawback of our system, however, lies in the fact that it makes no provision for the review of discretionary action — that there is no chance of reconsidering the question of expediency. It would be dangerous to vest such a power in the courts, although it has been done in some instances ; for the power to decide between conflicting interests is not judicial in the proper sense of the term, that is to say, it is beyond the control of objective rules, and the habitual exercise of such a power would necessarily impair the attitude of judicial neutrality, and would eventually undermine the confidence of the people in the courts of justice. The question of expediency must be reviewed with the same freedom with which it was originally considered, and therefore must be left to other administrative authorities: there is necessary, in other words, administrative control, and this is impracticable where the administration is not organized with a view to its exercise.

The impossibility of reviewing questions of expediency must inevitably produce this result, that the law will narrow as much as possible the sphere of discretionary action on the part of the administration. Instead of vesting its organs with power to decide between conflicting interests and to determine by their own judgment the course to be adopted according to the circumstances of the case, the law will fix precisely and completely the conditions under which the administration must act in a certain manner. Compliance with these conditions will place all individuals upon a basis of equality, and the administration is bound by fixed rules which are controllable and enforceable by the courts. This feature, as far as it can be applied, does away with the necessity of an administrative control. The tendency to frame administrative statutes in this manner is constantly growing, especially in the matter of granting and withholding licenses, franchises, *etc.*, and it is manifest not only in this country, but in Europe as well. On the other hand, the progress of civilization creates new spheres of administrative action in which the exercise of discretionary powers is indispensable. On this point the sanitary police may be mentioned as the most important illustration. Some

provision for reviewing questions of expediency will, therefore, remain a desideratum of American administrative law.

I think sufficient has been said to show how far-reaching in its effects upon the principles of American administrative law is the system of self-government, in so far as it means the lack of subordination of the lower to the higher organs of the administrative department and generally the lack of organic connection between the different offices. Perhaps of less legal importance, but of equal interest, is that other aspect of the system which relates to the character of the official *personnel* and the tenure of offices, and which we may designate as its non-professional character. The two features of self-government do not necessarily accompany each other ; the administration may be hierarchically organized and yet its members may not be professional office-holders. This is the case in our federal government, and in Europe the offices which are filled with non-professionals are not on that account withdrawn from the control of higher authorities, although some degree of independence is of the essence of self-government. On the whole, however, non-professional tenure of office and administrative independence on the one side, and hierarchical organization and professional office-holding on the other, go hand in hand. In the discussion of this distinction a contrast is sometimes made between professional and honorary offices.[1] The term honorary, while it expresses the ideal aspect of the system, fails to make allowance for its possible development in practice. The system, it is true, is based upon the idea that the conduct of government should enlist the voluntary services of the greatest possible number of citizens, so that each may realize from his own experience the claims of public interests ; that the inducement to enter the service of the state should be a sense of civil duty, and the only reward, the credit and honor attached to it. If this idea could be carried out, the lower degree of technical efficiency might indeed be greatly over-balanced by the political advantages of the system. But the question is: Can the idea be carried

[1] So Goodnow, *op. cit.*, ii, 7.

out in any government? Evidently one of two conditions must be present: Either the duties to be performed must be very simple and easy, and must not require continuous service or exclusive devotion to their performance — a condition which, as to the greater portion of administrative offices, exists only in rural government; or there must be a large number of citizens of wealth, leisure and sufficient public spirit to take an active interest in the administration — which was the case in Rome, and to a large extent in England. Neither of these conditions is applicable to the great majority of places in the civil service of a modern state, which are clerical and technical in character. If in filling these positions the non-professional character is insisted upon, either service must be made compulsory, or — and this is the almost inevitable course — it must be paid. But if office from a place of honor is turned into a place of profit, the system of self-government loses its most valuable feature, the moral independence of the officer. The principle of rotation will fail of its intended effect; it is bound to become an instrument for partisan purposes. Self-government, instead of meaning administration by the people, will mean administration by parties, or rather, since party differences have little meaning in the lower offices, administration by politicians. The office-holders will come to form a separate class of the community, just like the bureaucracy in Europe, only without the same training and experience. Instead of professional office-holders there will be professional office-seekers. This development is sufficiently familiar; it shows that the application of non-professional administration to all offices would have none of the political advantages claimed for self-government — that there is a large branch of the civil service to which the professional system alone is suited.

If this is true, the proper adjustment between the two systems becomes a question of great interest, and the example of the European countries in which the official organization unites both features is very instructive. The Prussian administrative reforms have introduced a most thorough and system-

atic combination of bureaucracy and self-government. France has only recently developed self-governmental features in her administration; while in England the tendency has rather been towards an extension of bureaucratic methods, — a natural reaction from the former extreme application of the principle of self-government. In all three countries this principle has found its most fruitful field in the local administration.[1] The bureaucratic system still rules supreme and almost exclusive in the central administration. Here the self-governmental principle is represented chiefly by the legislative bodies. The function of deliberating, advising, and approving or rejecting certain lines of policy seems indeed one especially appropriate for non-professionals, and the people will also naturally claim for their direct representatives a share in the control of the finances.

Opinions will probably differ most as to the proper method of filling the higher executive offices. In favor of the bureaucratic system it may be urged, in addition to the advantages of training and experience, that the government should have in some part of its organization a permanent element, and that this is most naturally the executive; it is indeed remarkable that in our government the executive is in this respect at a disadvantage compared to the legislature, which has at least the continuity of a body in which governmental custom and tradition can become firmly settled. On the other hand, a frequent change of the executive head of the government or of any of its departments means an infusion of fresh blood into the management of affairs, while professional training and ability in such a position is perhaps less necessary than executive ability. This applies, however, only to high executive offices with principally political duties. The English system, which regards only the very highest offices as subject to rotation and all others as professional, probably strikes the right mean. The question as to the best organization of the

[1] In view of this fact we are especially indebted to Professor Goodnow for giving, in his late work, a full description of the local organization of England, France and Prussia.

civil service belongs only partly to the administrative law; very largely it must be left to the policy or practice of the executive power. By prescribing qualifications for the holding of offices the law can make them professional in one sense, *i.e.*, by securing the proper training and knowledge. To make them professional in tenure, to make office-holding a career for life, the law would have to make officers irremovable except for specific causes — a course which has been adopted in Germany. Where the law does not do this, life tenure will become at most a matter of usage, which may, however, practically give the security of a legal life tenure; this is the case in France and England. As regards appointive offices, the administration may therefore have it in its power to organize the civil service on a professional or on a non-professional basis, and the law may go no further than to encourage the one or the other tendency. The federal statutes prescribing a definite term for most offices encouraged the principle of rotation, without making it absolutely necessary; and the present civil service reform acts, by qualifying the power of appointment without touching the power of removal, again merely encourage, without prescribing, a more permanent tenure of office. By making an office elective, however, constitutional or statutory legislation can fix its non-professional character; for cases in which technical qualifications are prescribed for eligibility are naturally rare, and the requirement of election at stated periods excludes the idea of life tenure. The extension of the principle of election to judicial, technical and ministerial offices, such as those of county clerk, register or sheriff, has therefore firmly impressed upon the administrative systems of many states the non-professional character. It would require a profound change in popular sentiment to bring about the substitution of bureaucratic systems in the administrative organization of these states.

On the whole, I think that a general comparison of the American and the European systems of administration plainly shows a technical superiority on the part of the latter. This in itself affords no conclusive reason why our system should

be changed after any European model. Professor Goodnow expresses a generally recognized view when he says that technical efficiency is not the only and not the first consideration in the administrative organization. Political causes and effects will always profoundly affect administrative problems, but this aspect belongs to the science of government rather than to administrative law.

It is a different question, and one as to which speculation is more justifiable, how far the present administrative system of the American states will be able to retain its peculiar features unimpaired, in view of the constant and inevitable expansion of the sphere of modern state activity. This must extend the province of administration as well as of legislation. Our present system is the product of an extreme democratic spirit, combined with a comparative simplicity of the conditions of government in the early history of the states. The spirit of democracy seems at the present time to seek different methods of asserting itself from those chosen in the first half of the century; and simplicity must necessarily give way to more complicated conditions with the progress of material civilization. The purpose of the framers of our state constitutions appears to have been to keep the government as weak as possible, but the strength of the government must grow with the expansion of its functions. With a change of the conditions that have made the present organization possible, the organization itself is liable to undergo important modifications. The direction of these modifications is indicated by present tendencies of legislation. New branches of administration have developed, and the departments in whose charge they are placed show at least some degree of centralization. In newly created offices there is a manifest tendency to revert from the principle of election to that of appointment; the civil service laws are putting a check upon the practice of rotation in office; above all, the changes in municipal government indicate a decided departure from the principle of loose and weak organization, and an approach to the forms of bureaucratic government; and the city only demonstrates

most typically the problems characteristic of the administration of the modern state. But the growing strength of the administration incident to its more compact organization is apt to be balanced on the other side by a curtailment of its discretionary functions, so that the increase in administrative activity is likely to be greater than the increase in administrative power over the individual.

The similarity of the tasks that devolve upon the state in every highly civilized country leads to a corresponding similarity in the tendencies of administrative law. As it has been found advisable in Germany for political reasons to offset the power of the bureaucracy by the independence of self-government, so in our system it is becoming necessary, for administrative reasons, to modify an exclusively self-governmental organization by an infusion of bureaucratic or professional elements. The result in each case is a combination of the two features. There is no danger at present that we shall ever fall under a highly centralized and bureaucratic administration like that of France, but the example of England shows that historical foundations and tradition alone cannot be relied upon to ensure the maintenance of pure self-government. It is to be hoped that in the institution of needed administrative reforms in America the experiences of the great European states will not be altogether lost upon our legislators.

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